IN THE COURT OF APPEAL

AT MALINDI

CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.

CIVIL APPEAL NO. 53 OF 2014

BETWEEN

MAGNATE VENTURES LIMITED……..…….APPELLANT

AND

ALLIANCE MEDIA (K) LIMITED...……..……1ST REPONSDENT

MUNICIPAL COUNCIL OF MOMBASA……..……2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Kasango, J.) dated 28th August 2014

in

H.C.C.C. No. 33 of 2012)

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JUDGMENT OF THE COURT

The appellant, ***Magnate Ventures Limited***, was the unsuccessful plaintiff before the High Court where it had sought various declarations and injunctions against ***Alliance Media (K) Ltd (the 1st respondent)*** and the former ***Municipal Council of Mombasa (the 2nd respondent).*** The declaration sought against the 1st respondent was that its erection of advertisement gantries in 5 specified sites in Mombasa City was illegal null and void on account of subsequent cancellation of approval by the 2nd respondent, while the declaration sought against the 2nd respondent was that its refusal to pull down and remove the 1st respondent's gantries, after cancellation of the approval to erect them, was arbitrary and illegal. As regards the injunctions, the appellant sought permanent injunctions to restrain the respondents from erecting or permitting the erection of advertising billboards and gantries in the disputed sites. The mandatory injunctions sought were to compel the respondents to remove the gantries already erected on those sites.

The appellant is a member of the Outdoor Advertising Association of Kenya and is an active player in the outdoor advertising industry. The 1st respondent is a fairly recent entrant in the business in Kenya and is yet to be admitted as a member of the Association, it claims, despite its long pending application for membership. At all material times, the appellant's Managing Director, ***Mr. Stephen Kinyanjui*** was also

the Secretary General of the Outdoor Adverting Association of Kenya.

By a plaint dated 17th January 2012, the appellant instituted proceedings in the High Court against the respondents contending that by virtue of a prior license issued to it by the 2nd respondent, it had erected advertising billboards and signs to promote various products and services offered by its clients. However, in breach of local authority and physical planning statutes, by-laws, and the appellant's rights, the 2nd respondent had, between 2008 and 2010 approved and allowed the 1st respondent to erect and install arches and gantries at five sites in Mombasa in close proximity to the appellant's existing billboards, thereby risking blockage or obstruction of the appellant's billboards and consequential loss and damage arising from its breach of contract to its advertising clients. The sites in issue were listed as:

i. ***Makupa causeway entering Mombasa Island;***
ii. ***Changamwe roundabout***
iii. ***Airport road***
iv. ***Nyali bridge***
v. ***Nakumatt Nyali, Malindi road***

It was further pleaded that although the 2nd respondent had on 17th December 2010 revoked the approval for the erection of the appellant's arches and gantries, the 1st respondent had continued or maintained the illegal erections and installations in blatant violation of the law and the appellant's rights and that the 2nd respondent had failed or refused to discharge its duty to pull down and remove the illegal installations. Consequently the appellant craved the reliefs of declarations and permanent and mandatory inunctions as earlier stated.

In its defence filed on 20th February 2012 the 1st respondent pleaded that it had, in September 2008 obtained the necessary approval from the 2nd respondent to erect its advertisement arches and gantries in Mombasa and that its structural plans and drawings were duly approved by the Ministry of Public Works and Roads. However, at the instigation of the appellant and purely to stifle legitimate business competition, the appellant procured the 2nd respondent to cancel the 1st respondent's approval, and in the meantime accelerated its own erection of billboards in the disputed sites so as to steal a match on the appellant and completely edge it out of the sites and advertising business in Mombasa.

It was further pleaded that later the 1st respondent successfully applied to the 2nd respondent for review of the order cancelling its approval and on 2nd December 2011 the 1st respondent was allowed to erect its advertisement installations on specified sites, which it did lawfully and in compliance with the relevant statutes and by-laws. Otherwise the 1st respondent denied that its installations caused any obstruction to the appellant's advertisements or those of any other outdoor media advertiser.

The 2nd respondent's short defence denied the averments of wrong doing on its part and pleaded that it had not failed to discharge the duties vested in it by law. It prayed for dismissal of the appellant's suit as misconceived.

Kasango, J., heard the suit in which the appellant called two witnesses, the 1st respondent 1 witness, and the 2nd respondent called no witness. On 28th August 2014 the learned judge found for the respondents and dismissed the appellant's suit with costs, thus precipitating this appeal.

It is apt to point out at this stage that although the 2nd respondent took part during the hearing of the suit before the High Court, at the hearing of this appeal and with the consent of the other parties, it was excused from participating in this appeal.

The appellant's memorandum of appeal raised 8 grounds of appeal, which its learned counsel, ***Mr. Havi*** argued in four clusters. It was submitted that the trial judge had erred in the evaluation of the evidence that was adduced and that she had imposed upon the appellant the burden of proving facts that were not in

dispute. Learned counsel contended that the learned judge had erred by holding that there was no evidence of threatened cancellation of advertisement contracts by the appellant's clients due to obstruction of their advertisements by the 1st respondent's media, whilst the contracts produced as evidence clearly obliged the appellant to ensure that there was no obstruction or blockage of the clients' advertisements and that in addition the appellant's Managing Director had testified in court on the consequences of obstruction of its client's advertisements.

Counsel further contended that the learned judge had erred by concluding that the appellant had erected its billboards on the disputed sites after it had succeeded in causing the revocation of the 1st respondent's approval, while in fact the appellant had obtained its permits much earlier and was on the sites before the 1st respondent. It was submitted that in any event, that was an irrelevant consideration.

Regarding obstruction of the appellant's media, learned counsel argued that the 2nd respondent had in the letter of 17th December 2010 concluded that the 1st respondent's gantries were indeed an obstruction and that the learned judge had therefore erred in holding that there was no obstruction. Developing this theme further, Mr. Havi submitted that the learned judge had further erred by concluding, after visiting the sites, that there was obstruction of the appellant's media if one was driving, but that there was no obstruction if one was walking. In counsel's view, this was a baseless distinction since the primary target of the advertisers was motorists rather than pedestrians. It was therefore argued that the trial judge had erred in concluding that there was no obstruction and we were accordingly invited to re-evaluate the evidence and come to our own independent conclusions, different from those of the learned trial judge.

Next, counsel submitted that the trial judge had also erred in failing to address all the issues that had been framed, including those that had been framed by the judge who had heard the appellant's successful interlocutory application for injunction. In this respect the appellant's main complaint was that the trial judge had not addressed the question of equal opportunity to all advertisers clamouring for public space as well as participation of all the advertising parties in the identification of advertising sites. We were urged to find that the failure to address these issues vitiated the judgment.

The last submission was that the 1st respondent did not have permits to the sites and therefore its gantries were illegally erected. It was submitted that a letter of no objection was not the same as a permit and that the 1st respondent had not produced permits allowing it to erect its gantries.

For the 1st respondent, ***Mr. Nyongesa,*** learned counsel, opposed the appeal submitting that it was absolutely lacking in merit. The 1st respondent maintained that the real intention of the appellant's suit was to stifle competition and to thwart the entry of the 1st respondent into the advertising business in Mombasa. This was deduced from the fact that the appellant's managing director was the author of the letter of compliant which led to the cancellation of the 1st respondent's approval; that the letter of complaint was on the letterhead of the Outdoor Advertising Association of Kenya; that the appellant did not disclose that it was the real complainant; that although the complaint was against the 1st respondent, it was not copied to it; and that the appellant was abusing its influential position in the Outdoor Advertising Association of Kenya where its Managing Director was the Secretary General, to advance its own interests. It was also submitted that from the evidence of ***Mr. Peter Odoyo***, the Chairman of the Outdoor Advertising Association of Kenya, the Association was not aware of the compliant against the 1st respondent.

It was further submitted that the 1st respondent had not even put up its gantries on the disputed sites before its approval was cancelled. After obtaining a letter of no objection from the 2nd respondent, it was argued, the 1st respondent proceeded to prepare its structural plans and drawings regarding its advertising gantries and arches, which were duly approved by the Ministry of Public Works and Roads.

On the obstruction of the appellant's media by that of the 1st respondent, it was argued that the 2nd respondent did not have any policy guidelines or regulations on the distances between the competing

media and therefore the 1st respondent could not be accused of violating non-existent guidelines and regulations. In addition it was contended that as part of the hearing, the learned trial judge had visited the disputed sites and after closely examining the 1st respondent's gantries relative to the appellant's billboards, had correctly concluded that there was no obstruction to justify the injunctions sought by the appellant. We were asked not to interfere with the conclusion of the learned judge who had the advantage of visiting the sites and observing the gantries and billboards.

Regarding the legality of the 1st respondent's gantries, it was submitted that after the cancellation of the 1st respondent's approval by the 2nd respondent on 17th December 2010, the 1st respondent requested a review of that decision vide a letter dated 7th September 2011. On 2nd December 2011 the 2nd respondent reversed its decision and allowed the applicant to continue with erection of its gantries. We were therefore requested to find that the 1st respondent's gantries were not erected in defiance of the cancellation of its approval by the 2nd respondent as alleged by the appellant, but lawfully and on the strength of the 2nd respondent's decision of 2nd December 2011.

Lastly on the issues that were determined by the learned judge, it was submitted that the judge had addressed all the relevant issues that arose from the pleadings and those that were necessary for resolution of the matters in dispute. It was submitted that the appellant had neither raised nor addressed the issues that it now contended ought to have been addressed by the learned judge.

We have carefully considered the judgment of the High Court, the grounds of appeal, the illuminating submissions of learned counsel, the authorities relied upon by the respective parties, and the law. This being a first appeal, we are enjoined to revisit the evidence that was before the superior court afresh, analyze and evaluate it, and come to our own independent conclusion, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor and giving allowance for that. (See ***SELLE V. ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123*** and **SEASCAPES LTD V. DEVELOPMENT FINANCE COMPANY OF KENYA LTD (2009) KLR, 384, 396).**

In undertaking the above task, we shall also bear in mind what this Court stated in ***RAMJI RATNA & COMPANY LTD V. WOOD PRODUCTS (KENYA) LTD C.A NO. 117 OF 2001,*** namely:

A Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the findings he did. The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings on fact and would only do so if (a) it appeared that he had failed to take account of particular circumstance or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of material witness was inconsistent with evidence in the case generally."

The appellant's case before the trial court was that since 2002 the 2nd respondent had licensed it to undertake outdoor advertising in Mombasa, as a result of which it acquired advertising sites, among them the 5 sites already mentioned. Those sites were sold to its various clients, including Safaricom, Imperial Bank, and the Agha Khan Health Services to carry their advertisements on the understanding that the advertisements would be conspicuous, free of obstruction and highly visible.

On 9th December 2010 the appellant's Managing Director, in his capacity as the Secretary of the Outdoor Advertising Association of Kenya wrote to the 2nd respondent complaining that the 1st respondent's proposed gantries, which were a new media, would block advertising media by other members. In response to that complaint, the Town Clerk, on 17th December 2010 wrote to the 1st respondent informing it that its approvals to erect gantries in the City had been revoked due to obstruction of other outdoor advertisers already in existence. On 6th September 2011, the 2nd respondent sent to the 1st respondent another letter demanding the removal of its gantries.

The appellant's basis for the claim for declarations and injunctions is the cancellation of the approval granted to the 1st respondent to erect the gantries. That is what the appellant pleaded. The record however, shows that the 1st respondent wrote to the 2nd respondent on 7th September 2011 regarding the revocation of its approval and by a letter dated 2nd December 2011, the 2nd respondent rescinded its decision of 17th December 2010. To the extent therefore that the appellant's case against the 1st respondent was based on the allegation that the 1st respondent's gantries and arches were being erected and maintained in violation of the cancellation of approval by the 2nd respondent, we agree with the learned judge that the appellant had totally failed to establish that limb of its claim and that there was no basis upon which the declarations and the prohibitory and mandatory injunctions sought could have issued.

Before us the appellant attempted to change its case so as to argue that the 1st respondent's had never at all obtained permits to erect its gantries. As we have stated, the appellant's case was clear enough that it was aggrieved by the continued existence of the 1st respondent's gantries after cancellation of its approval by the 2nd respondent and also by the 2nd respondent's failure to pull down those gantries after it had cancelled the approval. Its case was not that the 1st respondent had never at all obtained permits to erect its gantries; rather its case was that the 1st appellant had erected its gantries notwithstanding cancellation of its approvals by the 2nd respondent.

In ***GANDY V. CASPAR AIR CHARTERS LTD [1956] 23 EACA", 139*** the former Court of Appeal for Eastern Africa expressed itself as follows on the purpose of pleadings:

"…the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."

And in ***GALAXY PAINTS CO. LTD. V. FALCON GUARDS LTD. [2000] 2 EA 385***, this Court stated that the issues for determination in a suit flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. ***(See also IEBC & ANOTHER V. STEPHEN MUTINDA MULE & OTHERS, CA No. 219 of 2013).***

The exception to the general rule that parties are bound by their pleadings, expounded in such cases as ***ODD JOBS V. MUBIA [1970] EA 476*** and ***VYAS INDUSTRIES LTD. V. DIOCESS OF MERU [1982] KLR 114)*** arises where the parties raise and address unpleaded issues and leave them to the Court to decide. That exception does not, in our view, apply in the present case.

The appellant's complaint regarding obstruction of its media by that of the 1st respondent was founded on the argument that the 1st respondent's outdoor advertisement material was supposed to be 150 meters from that of the appellant. From the evidence, it was common ground that as of the time of the trial, the 2nd respondent had not formulated any policy or regulations on the distances between various outdoor advertisement media. The evidence of the appellant's managing director was that by practice the Outdoor Advertising Association of Kenya, of which the 1st respondent is not a member, had set the distances at 150 meters. From the evidence of the Chairman of the Association, ***Mr. Peter Odoyo,*** the approved distance was 100 meters, and can be as little as 50 meters. Mr. Odoyo's view was also the position that was taken by the 1st respondent's witness, ***Mr. John Wambua Muswa.*** In the absence of clear policy and regulations by the 2nd respondent, or even a consistent position from the Association itself, we agree with counsel for the 1st respondent that it would be difficult to sustain the argument that the 1st respondent had violated regulations relating to distances of advertising media.

Closely related to that issue is the question whether as on facts, the 1st respondent's media was obstructing that of the appellant. While it is true that at the interlocutory stage the court found in favour of the appellant, it must be remembered that the finding was based on a *prima facie* case without the benefit

of a full hearing. In addition, the decision at the interlocutory stage was based on photographs of the billboards and the gantries, which were at the hearing of the case, alleged to have been computer generated rather than a representation of the reality on the ground.

At the hearing of the suit, the trial court visited the disputed sites on 18th September 2013 and observed the alleged obstruction. Although the appellant complains that the learned judge found that there was obstruction when driving but none while walking, we are of the view that is not a correct representation of the conclusion of the learned judge. At page 22 of the judgment, the learned judge expressed herself thus:

"In respect of the second issue the court visited the sites at Airport road, Changamwe Roundabout, Makupa Causeway, Makupa Roundabout and Nyali Bridge. In that visit I was able to observe the distance between plaintiff's (appellant's) and 1st defendant's (1st respondent's) advertisements. In terms of distance between them I could not see any difference between those advertisements and others, which are not the subject of this case. The only difference is that the 1st defendant's advertisements are on a gantry, very much like a flyover, which goes across the road while (the) plaintiff's are on a billboard. In terms of interference of (the) 1st defendant's structures with (the) plaintiff's billboard I respond in the negative. In my view, since no party was able to show what is the accepted distance that should be between adverts I find the 1st defendant did not interfere with the sight of the plaintiff's advertisement. It is true that for a fraction of a moment as one drives along Airport road, Changamwe Roundabout and Nyali Bridge, that the 1st defendant's gantry slightly, and I repeat slightly, covers (the) plaintiff's advertisement but as one drives or walks along, the plaintiff's advertisement is not in any way blocked. I might add that, and this is in particular to Nyali Bridge, other Billboards of the same height as the plaintiff's billboard, do also, as one drives along the bridge, obliterate (the) plaintiff's advertisement to the same extent as (the) 1st defendant's gantry but as one drives or walks along that blockage dissipates. (Emphasis added).

The trial judge had the distinct advantage hearing and seeing the witnesses called by the parties testify. More importantly, she had the opportunity of visiting the sites and observing the obstruction complained of by the appellant. She concluded that there was really no obstruction to justify the remedies sought. Having evaluated the entire evidence on record, we do not see the basis for disagreeing with the learned judge. As has been said time and again, it is a strong thing for this Court to differ with the conclusion of the trial judge on questions of fact and further that this Court will not substitute its opinion for that of the trial judge merely because, in the shoes of the judge, it would possibly have come to a different conclusion.

In **SUSAN MUNYI V. KESHAR SHIANI, C.A. NO. 38 OF 2002,** this Court explained the rationale of the above approach thus:

"…we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."

On the question whether the cancellation of the appellant's approval was instigated by the appellant and whether that question was irrelevant, we find that the issue was directly raised in the pleadings by the 1st respondent and evidence was led to that effect and witnesses testified and were cross-examined on the issue. Accordingly, we do not think that there is any basis for faulting the learned judge for concluding that from the evidence, the cancellation of the 1st plaintiff's approval was instigated by the appellant whose managing director was the secretary general of the Outdoor Advertisers Association of Kenya, and without affording the 1st respondent any opportunity to be heard.

On whether the learned judge had addressed all the relevant issues raised or framed by the parties, we are satisfied that the learned judge did address all the issues that were necessary to determine the dispute. The

learned judge who heard the interlocutory application for injunctive relief raised the issues that the appellant's complaint were not considered by the trial judge. Those issues were not raised directly in the pleadings and a consideration of them was not, in our view, necessary to resolve the issues in dispute.

In ***WACHIRA WARURU & ANOTHER V. FRANCIS OYATSI, CA NO. 223 OF 2000***, this Court stated that a ruling or judgment should contain the points in issue and the reasons for the decision. (***See also J. P. MACHIRA V WANGETHI MWANGI & ANOTHER, CA NO. 179 OF 1997)***. Indeed ***Order 21 rules 4 and 5*** of the ***Civil Procedure Rules*** require the judgment to contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. Where issues have been framed, the court is obliged to state its finding or decision, with the reasons therefor, upon each separate issue.

In this case the learned judge duly considered the issues that were placed before her by the parties and even considered the issues that had earlier been raised by the court when it heard the interlocutory application, and found the two issues that were canvassed in this appeal not to be relevant for the determination of the dispute before her. In our view, the learned judge complied sufficiently with the requirements of Order 21 rules 4 and 5 and there is no basis for interfering with her decision.

Having carefully reevaluated, analyzed and reconsidered the evidence on record, we do not perceive any error on the part of the learned trial judge in the evaluation of the evidence. Accordingly, we are not persuaded that the appellant's appeal has merit, and the same is hereby dismissed with costs to the 1st respondent.

Dated and delivered at Mombasa this 15th day of May, 2015

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR